OFFICE SUPREME COURT, U.S.
FILED
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No. 83-251

IN THE

Supreme Court of the United States

October Term, 1983

PRC HARRIS, INC.,

Petitioner

v.

THE BOEING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals for the Second Circuit err in reaffirming that a dismissal of a federal court action because of the bar of the applicable state statute of limitations is a dismissal with prejudice which prevents subsequent litigation of the same claim pursuant to Fed. R. Civ. P. 41(b)?

2. Did the Court of Appeals err in applying the language of Fed. R. Civ. P. 41(b) to interpret the meaning of an order of dismissal by a federal court?

3. Did the Court of Appeals err in dismissing petitioner's second cause of action based on the same claim previously dismissed by a federal court when the first action was dismissed pursuant to Fed. R. Civ. P. 41(b) and

petitioner did not seek to amend that first order of dismissal until the district court had dismissed the second cause of action nearly one year after the first court dismissal?

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DESIGNATION OF CORPORATE SUBSIDIARIES AND AFFILIATES

The subsidiaries and affiliates (including joint ventures) of the Boeing Company are set forth in a list at the end of this brief.

COUNTERSTATEMENT OF THE CASE

Respondent The Boeing Company incorporates herein the statement of facts set forth by the Court of Appeals for the Second Circuit (Petition, pp. A2-A3).

REASONS FOR DENYING THE WRIT

Introduction

The petition for a writ of certiorari should be denied both because the decision below is consistent with this Court's decisions and because there is no conflict among the courts of appeals as to the questions presented by the petition. Petitioner's claims to the contrary are supported only by distortions and misstatements of the cited cases.

I. The Decision Below Does Not Conflict With the Rulings of This Court

The Court of Appeals for the Second Circuit, consistent with its prior decisions in Bertha Building Corp. v. National Theatres Corp., 248 F.2d 833 (2d Cir. 1957), cert. denied, 356 U.S. 936 (1958) and Sack v. Low, 478 F.2d 360 (2d Cir. 1973), applied the plain language of Fed. R. Civ. P. 41(b) and

held that a federal court dismissal on the basis of a statute of limitations bar is a dismissal with prejudice. Rule 41(b) provides that only dismissals for lack of jurisdiction, improper venue or failure to join a party under Fed. R. Civ. P. 19 can be considered, unless otherwise specified, as dismissals without prejudice. A statute of limitations dismissal by a federal court falls into none of these categories and is therefore to be construed as a dismissal with prejudice. No federal court has ever held otherwise and petitioner cites no contrary authority.

Instead, petitioner would attempt to construe a statute of limitations dismissal as a dismissal for lack of jurisdiction and thereby bootstrap its way into the exceptions under Rule 41(b) to the general presumption of

dismissal with prejudice. To support that theory, petitioner relies upon Costello v. United States, 365 U.S. 265 (1961). In Costello, this Court held that a dismissal for failure to file an affidavit of good cause in a denaturalization proceeding was a dismissal for lack of jurisdiction within the meaning of Fed. R. Civ. P. 41(b) because the filing of such an affidavit was a prerequisite to the court hearing the case at all. As the decision below noted (Petition, p. A5, n.2), Costello in no way considered whether a statute of limitations dismissal was a dismissal for "lack of jursidiction."

Petitioner goes on to argue, however, that the decision below did not distinguish Costello on a "principled basis" (Petition, p. 14) and that Costello requires that only decisions

based on a hearing of the substantive facts at issue can be a dismissal on the merits. That claim ignores the fundamental point of Costello, Rule 41(b) and the prior case law. Dismissals for lack of jurisdiction occur where the court is prevented by some precondition from even beginning to consider the matters alleged. A timebar determination, by contrast, assumes or decides that a court can consider the issues but refuses to do so because of the staleness of the claim. Indeed, to obtain a dismissal based on the applicable statute of limitations requires the court to assume jurisdiction and consider the facts alleged concerning the nature of the case and the timing of the alleged events to determine (1) which statute of limitations applies and (2) whether the events occurred within the

limitations period.* This distinction was recently reaffirmed and explained by the Court of Appeals for the Fifth Circuit, en banc, in Nilsen v. City of Moss Point, 701 F.2d 556, 562 (5th Cir. 1983) (en banc).

Moreover the decision below does not conflict in any conceivable fashion with the principles of Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), or the full faith and credit doctrine. The question at issue is the interpretation of the meaning of a federal court order of dismissal pursuant to the terms of Fed. R. Civ. P. 41(b). There is no state law question raised for consider-

* In this case, the court not only took jurisdiction but transferred the action from the District of Columbia federal court to the District of Washington before that court considered whether the alleged breach of contract occurred more than three years before the filing of the suit in the District of Columbia.

ation by the courts in this case. It was petitioner who brought its first action in federal court and itself chose to be bound by the principles of Fed. R. Civ. P. 41(b). Petitioner cannot now claim that it would rather have state law rules of procedure be applied to interpret the meaning of a federal court order. Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962). See also, Degnan, Federalized Res Judicata, 85 Yale L.J. 741 (1976).

Petitioner's full faith and credit argument apparently rests on the view that the court of appeals failed to give proper respect to the belated amendment by the Seattle federal court of its order of dismissal almost one year after the entry of the order and after the New York federal district court had ruled that the Seattle judg-

ment was a dismissal with prejudice barring relitigation of the claim. Petitioner's argument rests on no citations of this Court's or any other court's decisions. The argument is also defective in that it rests on the false premise that the court of appeals in some fashion overturned the decision of the Seattle court. The reality is that the court did what appellate courts are supposed to do - render an opinion based on the record before the district court. See United States v. Alldredge, 432 F.2d 1248, 1250 (3d Cir. 1970). The court of appeals also refused to consider the belated amendment by the Seattle federal court because there was no explanation offered by petitioner for its one year delay in seeking an amendment of the original judgment. The court pointed out the universally recognized principle

that amendments of final orders under Fed. R. Civ. P. 60(b)(6) are to be granted only in extraordinary circumstances justifying delay (Petition, pp. A7, A11). See Ackermann v. United States, 340 U.S. 193, 202 (1950). Since no reason for delay was even suggested by petitioner, there was no reason for the court of appeals to take the extraordinary step of reaching out beyond the record before the district court to reverse the district court. In short, no constitutional issue is even raised by this petition since the basis for the court's decision is petitioner's unexcused and unexplained delay.

II. There is no Conflict Among the Courts of Appeals Regarding the Issues Presented

Petitioner attempts to create the appearance of a conflict in the decisions of the federal courts of

appeals regarding the issue of the res judicata effect of a statute of limitations dismissal under Fed. R. Civ. P. 41(b). But none of the cases cited, other than the precedent of the Court of Appeals for the Second Circuit (which supports the decision in this case),*

* Petitioner seems to argue that Judge Friendly expressed reservations about this application of Rule 41(b) in Sack v. Low, 478 F.2d 360 (2d Cir. 1973). However, the only doubt expressed there is whether a district court has any discretion at all to order that a statute of limitations dismissal may be without prejudice. Sack v. Low, id. at 364.

In that regard, petitioner argues that it somehow defies common sense to permit dismissals based on a statute of limitations to be without prejudice where the district court so specifies but to be with prejudice where not specified. The existence of such discretion is not before the Court since it was assumed by the court of appeals. The court of appeals was not presented with a record in which the first district court had exercised that discretion. The belated amendment of the Seattle

(footnote continued)

consider the question of whether a statute of limitations dismissal is a dismissal with prejudice under the terms of Fed. R. Civ. P. 41(b). The only other federal court decision to consider that question (uncited by petitioner) is Cemer v. Marathon Oil Co., 583 F.2d 830 (6th Cir. 1978). There, the Court of Appeals for the Sixth Circuit reached the identical result: Rule 41(b) plainly requires that a federal court dismissal based on a statute of limitations defense bars relitigation of the same issues in another court. Since the courts which have considered the central

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(footnote continued)

court's order occurred only after the district court had dismissed the second action. In any event, Rule 41(b) contemplates by its terms the existence of such discretion to order a dismissal as being without prejudice under certain unspecified circumstances.

issue in this case have all reached the same result, there is no conflict for this Court to resolve.

Conclusion

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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SUBSIDIARY LIST

The Boeing Company
Aircraft Sales & Financing Corp.
Astro Ltd.
BCS Richland, Inc.
BE&C Engineers, Inc.
BOECON Corporation
Boeing Agri-Industrial Company
Boeing of Canada, Ltd.
Boeing Computer Services Canada Ltd.
Boeing Computer Services (Europe) Ltd.
Boeing Computer Services of Illinois, Inc.
Boeing Computer Support Services, Inc.
Boeing Domestic Sales Corporation
Boeing Electronics, Inc.
Boeing Engineering and Construction Southeast, Inc.
Boeing Environmental Products, Inc.
Boeing Equipment Holding Company
Boeing Financial Corporation
Boeing International Corporation
Boeing International Sales Corporation
Boeing International S.R.L.
Boeing Leasing and Financial Corporation
Boeing Machine Products, Inc.
Boeing Operations International Inc.
Boeing Middle East Limited
Boeing Services International, Inc.
Boeing Technical and Management Services, Inc.
Boeing Technology International, Inc.
Colinco, Inc.
Hydraulic Units Incorporated
Resources Conservation Company
Resources Conservation Company International
Logistics Support Corporation
S.O.D.E.G.E.S.S.
Trans-National Housing Association
Vertol Corporation
234-I, Inc.
234-II, Inc.

727-I, Inc.
747SP-I, Inc.
747SP-II, Inc.
747SP-III, Inc.
747SP-IV, Inc.

	NAME		AFFILIATES
1.	Resource Conservation Company	1.	Boeing Environmental Products
		2.	Reading & Bates Development Company
2.	Solvolco	1.	BEC
		2.	Reading & Bates Development Company
3.	American Management Systems, Inc.	1.	Logica Holdings Ltd.
		2.	Racal-Decca Ltd.
		3.	Sintra-Alcatel S.A.
		4.	Standard Electrik Lorenz AG
		5.	The Boeing Company
		6.	Boeing Operations International, Inc.
		7.	Westinghouse Electric Corporation
		8.	Westinghouse Overseas Corporation
		9.	Informatique de Systemes et de Reseaux (ISR)
		10.	ESG Electronik-System - Gesellschaft mbH
4.	Peabody Holding Company	1.	Newmont Mining Corporation
		2.	The Williams Company
		3.	Bechtel Corporation
		4.	The Boeing Company

5.	Boeing - Lockheed National Air Space Company (NASCO)	1. The Boeing Company 2. Lockheed